Trust eSpeaking

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Welcome to the Autumn edition of *Trust eSpeaking*. We hope you find these articles thought-provoking, as well as being useful and interesting.

To find out more about any of the topics covered in *Trust eSpeaking*, or about trusts or wills in general, please don't hesitate to contact us; our details are on the top right.

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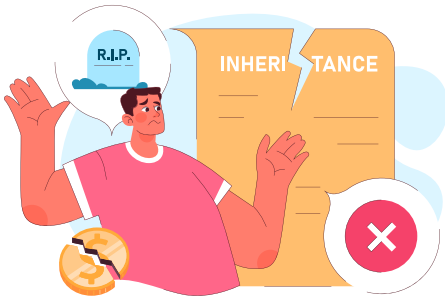

Disinheriting your children

Can it be done?

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If, however, a will-maker entirely excludes some close family members from their will, those people will often have claims against the will-maker's estate.

In the recent situation of what is known as the *Alphabet* case, an abusive father tried to use a trust to disinherit his children on his death.

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Gloriavale

De-banked!

The Gloriavale community receives a great deal of media attention. In particular, various allegations have been made that its leaders have breached employment obligations, physically and sexually abused members of the community, and ignored their legal responsibilities.

In July 2022, the Bank of New Zealand notified Gloriavale that it intended to end its long-standing contractual relationship and stop providing banking services. Gloriavale sued the bank, asserting that the bank had an obligation to provide it with continued banking services.

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Succession drama for Rupert Murdoch trust

Could this happen in New Zealand?

The critically-acclaimed TV show *Succession* was loosely based on the trials and tribulations of Rupert Murdoch and his family. Mr Murdoch controls many influential media outlets through the US-based Murdoch Family Trust.

Some years ago, Mr Murdoch became concerned at the different political views amongst his children. Mr Murdoch attempted to change the terms of the trust so that after his death, his oldest son would have sole voting rights and, therefore, more control over the media entities.

We look at whether this could happen in New Zealand.

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In the recent case of what is known as the *Alphabet* case,[1] an abusive father tried to use a trust to disinherit his children on his death.

Family Protection Act 1955

The Family Protection Act 1955 is designed to protect family members who have been excluded from a will or left without adequate provision. It allows certain groups of people (including spouses, partners and children) to claim against an estate for further provision.

The court follows a two-step approach when evaluating claims under the Act. First, it must decide whether the will-maker owed a duty to the claimant and, if so, whether that duty has been breached. Second, the court must consider what is required to remedy the breach.

The court takes a conservative approach in making awards for further provision. It will do no more than the minimum that it believes is necessary to address any breach of duty. There is no presumption of equal sharing between children, and the court will not rewrite a will based on its own perception of fairness. There is no formula, however, for assessing what is required to remedy a breach; each case depends on its own facts.

Important factors will include the size of the estate, the claimant's personal circumstances and other competing claims (such as from siblings or a parent/stepparent). In many cases, however, a financially stable adult child might expect to receive 10–15% of a parent's estate. That could increase if a child is in poor circumstances or has suffered abuse at the hands of their parent.

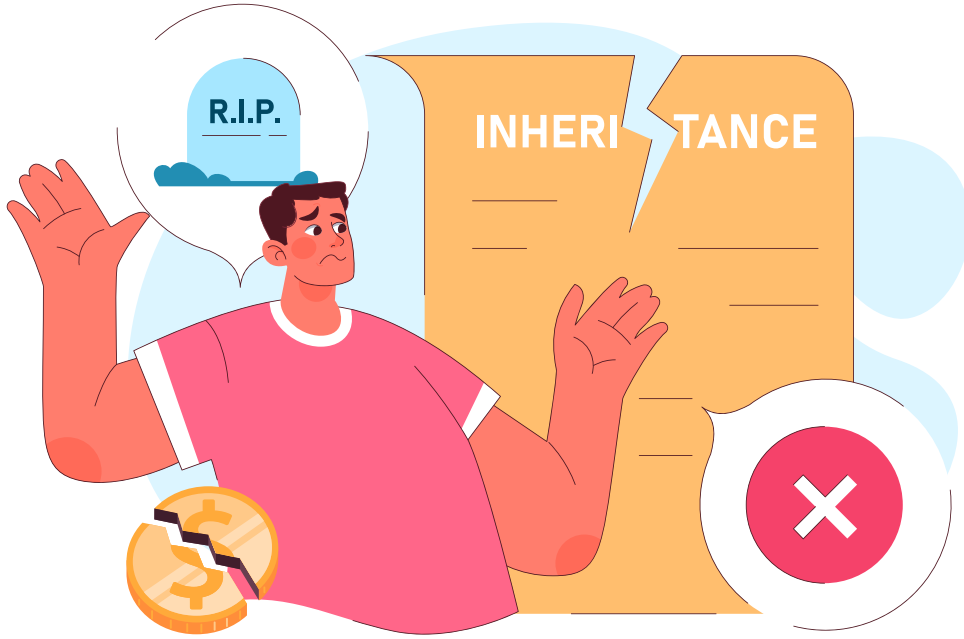
Making a successful claim

When a successful claim is made under the Act, the award will be paid from the deceased's estate. That necessarily means that claims are limited by the size of the estate. If a will-maker has gifted or transferred assets to a trust during their lifetime, or to other people, their estate may have little or nothing left in it. This has the effect of preventing estate claims because there is no estate available.

In the *Alphabet* case, an abusive father transferred his assets into a trust. His children wanted to bring claims against his estate, but there was nothing in it. They argued that they should effectively be able to unwind the transfer of assets to the trust, so that those assets went back into their father's estate, and they could bring claims under the Act. This case went all the way to the Supreme Court.

Alphabet case

In the *Alphabet* case, the deceased father was referred to as Robert, and his children as Alice, Barry and Cliff. Alice, Barry and Cliff experienced egregious abuse at Robert's hands and, understandably, did not have a relationship with him.



Robert took deliberate action during his lifetime to transfer most of his assets to a trust. None of his children were beneficiaries of that trust.

Alice, Barry and Cliff argued that Robert owed them fiduciary duties as a parent, and that he breached those duties when he abused them. They argued that the abuse created an ongoing fiduciary obligation which Robert breached when he transferred his assets into a trust. They argued that the transfer of assets could (and should) be unwound on this basis, and Robert's assets returned to his estate; this would allow them to make claims under the Act.

Fiduciary duties are duties to put someone else's interests before your own. They usually arise in relationships of particular trust and confidence. The Supreme Court acknowledged the existence of fiduciary duties between a parent and a minor child, but it found that these duties ended when the parent's caregiving responsibilities ceased. It did not agree that there remained a fiduciary duty owing later on which would prevent Robert transferring his assets to a trust.

The court noted that the Act does not contain any mechanism to 'claw back' assets which have been put in a trust or transferred to another person in order to avoid estate claims. It noted that this might be the subject of future law reform but it was not existing law.

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1 *A, B and C v D and E Limited as Trustees of the Z Trust* [2024] NZSC 161.

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Gloriavale

De-banked!

The Christian Church Community Trust and associated entities (commonly known as Gloriavale) has received a great deal of media attention.

In particular, various allegations have been made that its leaders:

- Breached a number of employment obligations, including using forced labour and child labour
- Physically and sexually abused members of the community, including children, and
- Ignored their legal obligations towards the people in its community, including ensuring their safety.

For many years, Gloriavale has banked with the Bank of New Zealand (BNZ). In July 2022, BNZ notified Gloriavale that it intended to end its contractual relationship and stop providing banking services.

What happened next?

BNZ originally gave Gloriavale three months to make new banking arrangements. This was extended by agreement, but BNZ did not agree to an extension beyond 30 November 2022.

Gloriavale tried, but was unable, to make alternative banking arrangements within that timeframe. Gloriavale then sued BNZ[2]; it said that BNZ had an obligation to provide it with continued banking services, particularly where there are no other options available. However, as litigation can take many years, this did not solve the problem that BNZ intended to terminate the banking relationship immediately.

Gloriavale therefore made a separate legal application for an injunction. The injunction case was brought alongside the main legal case. The main case argued that BNZ had to provide Gloriavale with continued banking services; this may take years to determine.

The injunction case argued that BNZ had to provide banking services until the main legal case had been determined. The High Court agreed with Gloriavale in the injunction case, but the Court of Appeal overturned that decision in December 2024. The result is that Gloriavale must find a new bank to use while the main legal case against BNZ goes through the court system. This is very significant in light of the evidence that Gloriavale has not been able to find another bank.

The arguments

An injunction will only be granted where there is a serious question in the main court case. In this case, the question was whether Gloriavale could seriously argue that BNZ was not entitled to end the banking relationship.

BNZ argued that its terms and conditions allowed it to terminate a banking relationship whenever it wishes. Just as a customer can fire a bank at any time, a bank can fire a customer. The bank's terms and conditions allowed it to decline to provide any product or service without needing to give a reason. It simply no longer wanted to work with Gloriavale.

Gloriavale argued that BNZ had to act reasonably and, that if it was concerned about recent allegations, it should have asked Gloriavale for more information rather than giving notice of termination with no warning. BNZ might have been wrong, and it would be unfair for the bank to cancel if they did not at least take steps to find out if they were right.

Court of Appeal decision

The Court of Appeal found that the main court case was weak. The banking contract did not require BNZ to undergo any kind of consultation process, to act reasonably or to verify any concerns it might have before terminating the banking relationship. BNZ did not act in bad faith; it had concerns that the Gloriavale community acted inconsistently with a variety of basic human rights and it no longer wanted Gloriavale as a customer. This was actually quite reasonable, as it transpired that other banks also did not want to work with Gloriavale.

Other arguments made on behalf of Gloriavale were similarly not persuasive.

While the Court of Appeal was only considering the issues on an interim basis, and the main court case would still continue to a full court hearing, the court did not find that Gloriavale had strong enough arguments to justify forcing BNZ to provide banking services in the meantime. It therefore overturned the High Court's decision to issue an injunction.

What next?

Gloriavale is a complicated commercial enterprise and it will need to find alternative banking arrangements. It will be interesting to see which trading bank will offer those services, when it seems that a number of banks have already declined.

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2 *Bank of New Zealand v The Christian Church Community Trust & Ors* [2024] NZCA 645.

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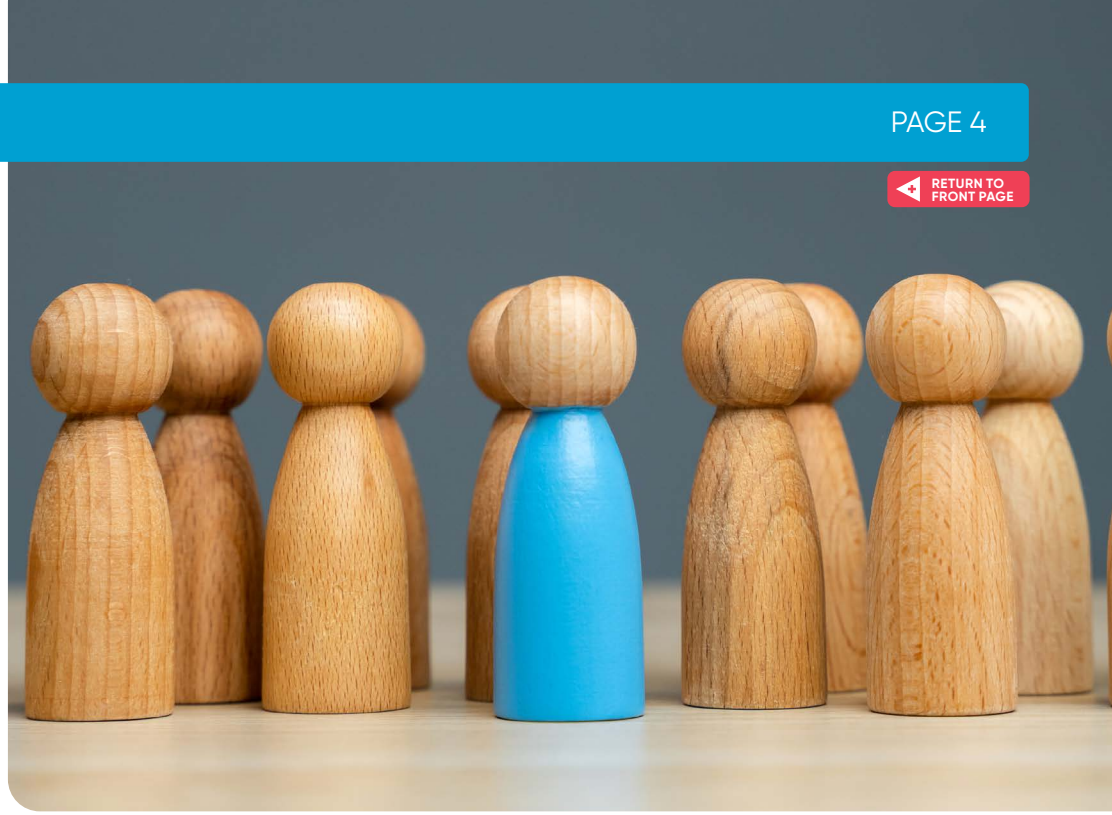
Succession drama for Rupert Murdoch trust



How would it play out in New Zealand?

The critically-acclaimed TV show *Succession* was loosely based on the trials and tribulations of the wealthy media mogul, Rupert Murdoch and his family. Rupert Murdoch controls Fox News and other influential news publications through the US-based Murdoch Family Trust, which he settled in 1999 after his divorce from his second wife, Anna.

Murdoch Family Trust

The Murdoch Family Trust is an irrevocable trust which owns large shareholdings in various media enterprises. Many American trusts are established as 'revocable' trusts, but this trust was settled as an 'irrevocable' trust, which means its terms are very difficult to change. They could only be changed by Rupert (the settlor) if he acted in good faith and if the changes were beneficial to the beneficiaries.

The trust's beneficiaries are Rupert's children. Different children were set to receive different rights on Rupert's death. His oldest four children – Prudence, Lachlan, James and Elisabeth – would each receive 25% of the voting rights in relation to the media companies. Rupert's youngest two children would receive equal shares of the value of the trust's assets, but they would not have any voting rights.

Some years ago, Rupert became concerned at the different political views amongst his children. Lachlan most closely shared Rupert's views, but Prudence, James and Elisabeth were thought to be more liberal. Rupert attempted to change the terms of the trust so that after his death, Lachlan, would have sole voting rights and, therefore, more control over the media entities.

The dispute went to court in the state of Nevada. Rupert and Lachlan argued that it was in the interests of family harmony that the terms of the trust be changed and Lachlan given control on Rupert's death. Prudence, James and Elisabeth argued that it was not in their interests to lose control. The court found that the attempt to change the terms of the trust was not in the interests of the beneficiaries and that it was a 'carefully crafted charade.'

Rupert and Lachlan say that they will appeal the decision but, for now, the terms of the trust remain in force.

What would this look like in New Zealand?

If something similar happened in New Zealand, this scenario would look very different from a trust law perspective.

Irrevocable trusts are not generally used in New Zealand; almost all trusts, once settled, exist from that point onward. However, our trusts are usually very flexible. Even if a trust cannot be *revoked*, it can usually be *resettled, varied*, or *distributed early.*

If Rupert Murdoch had settled a trust in New Zealand, it would probably give him discretionary powers to benefit his children during his lifetime. On his death, the trust assets would be divided between his children (or transferred to new trusts for each of them).

Many New Zealand trusts can be resettled onto a new trust with different terms (and sometimes with different beneficiaries). As long as the resettlement is genuinely for the benefit of at least one of the beneficiaries, it is often permitted, even if it is detrimental to others.

If Rupert wanted to significantly change the terms of the trust, and had a resettlement power, he may be able to move the trust assets to a new trust. However, tax problems often arise on resettlement, particularly with commercial assets, so resettlement may not be a good option.

Most New Zealand trusts can be varied, but variation powers are often limited to the terms of the trust relating to management and administration. They cannot usually be used to change the beneficiaries or their entitlements. A variation power might not help Rupert achieve his goals.

New Zealand trusts usually give trustees discretionary powers to distribute income and capital early. If Rupert was a trustee, he may try to transfer the voting rights to Lachlan early – before Rupert's death. Many New Zealand trusts would allow this, although it would depend on the terms of the trust and how much discretion the trustees were given.

Conclusion

The New Zealand trust landscape is very different to that in America. Our trusts are often more flexible than an American-style irrevocable trust. If the Murdoch Family Trust

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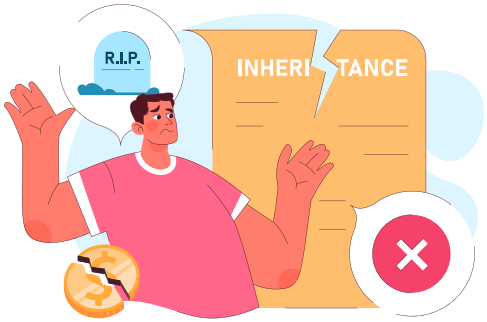
Robert's three children therefore failed in their attempt to bring assets back into Robert's estate, on which they could then have made Family Protection Act claims.

Law Commission

The Law Commission recently prepared a comprehensive review of succession law. It proposed that some form of anti-avoidance, or 'claw back' provision, be included in any law reform efforts that would address situations such as the *Alphabet* case.

While the government has considered the Law Commission's report, it has not yet taken any steps to progress law reform efforts. For the time being, this means trusts may continue to be used in order to prevent some potential estate claims, particularly those brought by children. +



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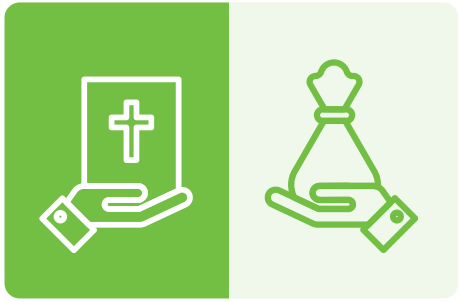
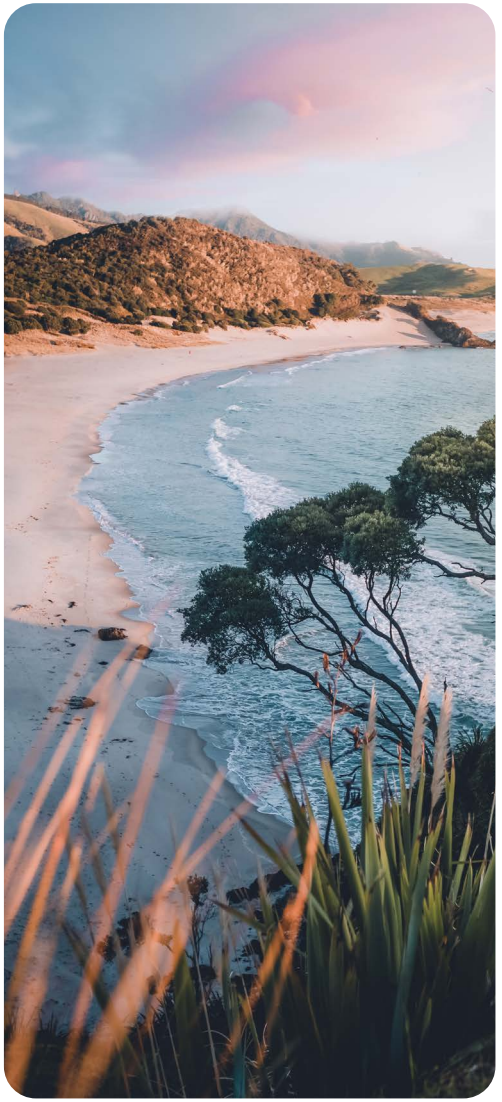
Gloriavale

It will also be interesting to see what happens in the underlying court case. Gloriavale is still arguing that the BNZ could not terminate the banking relationship. While the Court of Appeal doesn't think the arguments were strong, it is possible that a later judge will disagree after hearing the full argument. Gloriavale could still be successful and, if so, could pursue BNZ for any losses suffered due to the termination.

Banks are in a position of power in their customer relationships. Their terms and conditions usually let them terminate a relationship with a customer at any time. This is highly relevant for people or organisations that do not have many options. +





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Succession drama for Rupert Murdoch trust

had been settled in New Zealand, Rupert might have found a way to make the changes he wanted. It is also, however, possible that the terms would not have permitted him to make changes at all.

New Zealand trusts can be used for many purposes and drafted with a great deal of flexibility, or very little flexibility. It depends on the terms of the trust used at the outset when the trust is settled. Each family's needs will be different.

The Murdoch case illustrates how important it is to get things right from the outset to protect the beneficiaries from someone trying to make unexpected changes later. +

The next edition of *Trust eSpeaking* will be published in **late August**.

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